

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

BRYAN RANSOM,	)	No. CV-F-05-086 OWW/GSA PC
)	
	)	ORDER STRIKING DOC. 168,
Plaintiff,	)	GRANTING DEFENDANTS' MOTION
	)	FOR RELIEF FROM ORDER
vs.	)	ADOPTING FINDINGS AND
	)	RECOMMENDATIONS (Doc. 161)
	)	AND ADOPTING FINDINGS AND
M. JOHNSON, et al.,	)	RECOMMENDATION (Doc. 141)
	)	AND GRANTING IN PART AND
	)	DENYING IN PART PLAINTIFF'S
Defendants.	)	MOTION FOR SUMMARY JUDGMENT
	)	(Doc. 90)
)	

By Memorandum Decision and Order filed on August 26, 2008,
(Doc. 161), the Court adopted the Findings and Recommendation of
the United States Magistrate Judge that Plaintiff's motion for
summary judgment be granted in part and denied in part. In so
doing, the Court reviewed Plaintiff's objections to the Findings
and Recommendation and did not address Defendants' objections to

1 the Findings and Recommendation filed on August 25, 2008.¹

2 On September 17, 2008, Defendants filed a motion for relief
3 from the August 26, 2008 Memorandum Decision and Order,
4 requesting that the Court consider Defendants' objections to the
5 Findings and Recommendations.

6 Defendants' motion for relief from the August 26, 2008
7 Memorandum Decision and Order is GRANTED to the extent that it
8 seeks consideration of Defendants' objections.

9 In accordance with the provisions of 28 U.S.C. ' 636
10 (b) (1) (B) and Local Rule 73-305, this court has conducted a de
11 novo review of this case. Having carefully reviewed the entire
12 file, the court finds the findings and recommendation to be
13 supported by the record and proper analysis.

14 In pertinent part, the Findings and Recommendation
15 recommended that the Court grant Plaintiff's motion for summary
16 judgment on his First Amendment claim against Defendant Pear:

17 In his amended complaint, Plaintiff alleges
18 that on October 10, 2002, Defendant Pear
19 interviewed him on the ground that Defendant
20 had received information that Plaintiff was
21 planning to stage a demonstration against
22 CDCR. Plaintiff confirmed the information
23 and stated that on February 26, 2003, the
24 'Three-Strike Backlash Campaign' would be
25 launched, and prisoners would be called upon
26 to lawfully resist CDCR's forced double
celling practice. Defendant Pear told him
that Defendant Scribner, who was the warden,
did not take kindly to prison activism and
had ordered Defendant Pear to shut down
Plaintiff's efforts. Plaintiff's incoming

¹The Memorandum Decision and Order filed on October 14, 2008,
(Doc. 168), was filed in error. Doc. 168 is hereby STRICKEN.

1 and outgoing mail was thereafter flagged and
2 forwarded to Defendant Pear for censorship.
3 Numerous press releases and letters to the
4 media and other outside organizations were
5 forwarded to Defendant Pear, who issued
6 Plaintiff a CDC-115 Rules Violation Report
7 for inciting on February 25, 2003. Plaintiff
8 alleges that his hearing on the charge, which
9 should have been held within thirty days, was
10 delayed until July 30, 2003, by Defendant
11 Scribner. At the hearing, Plaintiff
12 discovered that Defendant Pear had withheld
13 all of his press releases and letters. After
14 reviewing the material, the hearing officer
15 dismissed the charge, finding that
16 Plaintiff's campaign fell with CDCR
17 guidelines and the First Amendment.
18 Plaintiff asserts a First Amendment claim
19 arising out of the confiscation of his
20 outgoing mail.

21 Plaintiff has a First Amendment right to send
22 outgoing mail. Wetherow v. Paff, 52 F.3d
23 264, 265 (9th Cir.1995). However, the right
24 is not absolute and may be infringed upon by
25 prison officials under certain circumstances.
26 Id. Prisoners do not retain rights
inconsistent with proper incarceration.
Overton v. Bazetta, 539 U.S. 126, 131 ...
(2003), and courts are to analyze regulations
impinging upon rights which are inconsistent
with proper incarceration under the Turner
test, Johnson v. California, 543 U.S. 499,
500 ... (2005), previously set forth in
subsection A. 'When a prison regulation
affects outgoing mail as opposed to incoming
mail, there must be a closer fit between the
regulation and the purpose it serves,'
although 'in neither case must the regulation
satisfy a least restrictive means test.'
O'Keefe v. Van Boening, 82 F.3d 322, 326 (9th
Cir.1996)

27 In his motion, Plaintiff argues that he is
28 entitled to summary adjudication on the claim
29 that Defendant Pear withheld his outgoing
30 mail to the media from at least October 10,
31 2002, through October 1, 2003. (U.F. 7). In
32 support of his motion, Plaintiff submits
33 evidence that on February 25, 2003, Defendant
34 Pear confiscated letters addressed to KMPH

1 TV, Pacifica Radio, and Dr. Ray Evans. The
2 letters were confiscated because they
3 contained documents indicating Plaintiff's
4 intent to initiate a mass inmate
5 demonstration to commence on February 26,
6 2003, and the letters requested publicity for
7 the event. (Doc. 91, 37:23-38:1; Doc. 91,
8 Ex. V.) Plaintiff submits evidence that the
9 correspondence was withheld until October 1,
10 2003, at which time the three letters were
11 returned to Plaintiff. (Doc. 91, 38:2-7;
12 Doc. 93, Ex. X.)

13 Defendants have submitted evidence that the
14 planned demonstration was considered a threat
15 to the safe operation of the prison, and that
16 even though Plaintiff contended it was to be
17 a peaceful demonstration, they had no way of
18 confirming Plaintiff's intent or of
19 predicting that the demonstration would
20 remain peaceful. (U.F. 38.) Defendants
21 argue that Plaintiff's claim of interference
22 with his planned and unlawful demonstration
23 must fail because Defendant Pear determined
24 the demonstration was not lawful, and
25 Plaintiff did not have a right to disrupt
26 administration of the prison. Defendants
also argue that Plaintiff had an alternate
means of expressing his unhappiness with the
double celling issue by filing an
administrative grievance or filing suit.

17 The problem with Defendants' argument is that
18 the claim arises not out of the right of
19 association but out of the right to send
20 mail. Plaintiff is not premising his claim
21 on an unconstitutional disallowance of an
22 inmate demonstration or from an
23 unconstitutional interference with his right
24 to redress his grievance over double celling.
25 In order to defeat Plaintiff's motion,
26 Defendants must submit evidence raising a
disputed issue of fact. Under Turner, this
requires that Defendants proffer evidence
that the confiscation of Plaintiff's outgoing
letters to the media was reasonably related
to a legitimate penological interest. If
there is no rational relationship to a
legitimate and neutral governmental
objection, the remaining three Turner factors
are not reached. Prison Legal News v.

1 Lehman, 397 F.3d 692, 699 (9th Cir.2005) .

2 'Courts must afford substantial deference to
3 the professional judgment of prison
4 administrators.' Overton, 539 U.S. at 132.
5 Here, however, Defendants have submitted no
6 evidence that the three letters to the media
7 represented a threat to the safety and
8 security of the institution. Outgoing mail,
9 by its very nature, does not represent the
10 same level of serious threat to institutional
11 safety and security that incoming mail does,
12 and security implications from outgoing mail
13 are far more predictable. Thornburgh v.
14 Abbott, 490 U.S. 401, 411-12 ...
15 (1989) (citing to Procunier v. Martinez, 416
16 U.S. 396, 413 ... (1974)). The record is
17 simply devoid of any evidence that
18 Plaintiff's letters to the media describing
19 his planned demonstration and asking them to
20 publicize it represented a threat to the
21 safety and security of the institution and
22 justified the confiscation of the letters.

23 Further, although Defendant Pear argues that
24 in the alternative, he is entitled to
25 qualified immunity, Defendant's only argument
26 is that Plaintiff presented no evidence his
27 right 'to organize and publicize a mass
28 demonstration overly [sic] designed to
29 disrupt prison operations' was clearly
30 established. (Doc. 108-9, Opp., pg. 12:6-9.)
31 This argument does not address Plaintiff's
32 First Amendment claim that his outgoing mail
33 was confiscated. At the time of the mail
34 confiscation, it was clear that prisoners had
35 a First Amendment right to send mail and that
36 the right could be infringed upon only if the
37 infringement was rationally related to a
38 legitimate penological purpose. O'Keefe, 82
39 F.3d at 325-26; Wetherow, 52 F.3 at 325.
40 Preserving the safety and security of a
41 prison is certainly a legitimate penological
42 purpose, but there has been no showing that
43 the mailing of the three letters to the media
44 would have presented a threat to the safety
45 and security of the institution, and as such,
46 Defendant has not demonstrated entitlement to
47 qualified immunity. In the absence of any
48 evidence linking the confiscation of the
49 outgoing letters by Defendant Pear to a

1 legitimate penological interest, Court must
2 recommend that Plaintiff be granted judgment
3 as a matter of law on his First Amendment
4 claim.³

³This entitlement to judgment is limited to
the confiscation of the three letters.

5 Defendants object to the Findings and Recommendation,
6 asserting that Plaintiff contends that Defendant Pear had no
7 right to block his efforts to publicize his planned demonstration
8 by confiscating the three letters. Defendants argue that
9 Plaintiff's contention fails because the purpose of the three
10 letters to the media was to promote an unlawful demonstration.
11 Defendants contend that Defendant Pear's actions were reasonably
12 related to a legitimate penological interest because Plaintiff's
13 activity violated numerous prison regulations. Specifically,
14 Defendants refer to 15 C.C.R. § 3006(c) (5) and (6):

15 Except as authorized by the institution head,
16 inmates shall not possess or have under their
17 control any matter which contains or concerns
any of the following:

18 ...

19 (5) Plans to disrupt the order, or breach the
security, of any facility.

20 (6) Plans for activities which violate the
21 law, these regulations, or local procedures.

22 Defendants also refer to 15 C.C.R. § 3132(a): "Correspondents are
23 personally responsible for the content of each item of mail they
24 send into or out of a correctional facility." Finally,
25 Defendants cite 15 C.C.R. § 3136(a):

26 Disapproval of inmate mail that is in clear
violation of CCR section[] 3006 ... shall be

1 referred to staff not below the level of
2 Correctional Facility Captain for
3 determination and appropriate action.
4 Disapproval of inmate mail that is not in
5 clear violation of CCR section[] 3006 ...
6 shall be referred to the Warden, but not
7 lower than the Chief Deputy Warden, for
8 determination and appropriate action. When
9 incoming and outgoing mail ... are addressed
10 to or being sent by an inmate are withheld or
11 disallowed, the inmate shall be informed via
12 CDC Form 1819, Notification of Disapproval -
13 Mail ... of the reason, disposition, name of
14 official disallowing the mail ..., and the
15 name of the official to whom an appeal can be
16 directed.

17 Defendants place primary reliance on *Jones v. N.C.*
18 *Prisoners' Labor Union, Inc.* 433 U.S. 119 (1977).
19

20 In *Jones*, a prisoners' labor union brought an action under
21 Section 1983, claiming that its First Amendment rights were
22 violated by prison regulations that prohibited prisoners from
23 soliciting other inmates to join the union and barred union
24 meetings and bulk mailings concerning the union from outside
25 sources. The Supreme Court held:

26 An examination of the potential restrictions
on speech or association that have been
imposed by the regulations under challenge,
demonstrates that the restrictions imposed
are reasonable, and are consistent with the
inmates' status as prisoners and with the
legitimate operational considerations of the
institution. To begin with, First Amendment
speech rights are barely implicated in this
case. Mail rights are not themselves
implicated; the only question respecting the
mail is that of bulk mailings. The
advantages of bulk mailings to inmates by the
Union are those of cheaper rates and
convenience ... [I]t is clear that losing
these cost advantages does not fundamentally
implicate *free speech* values. Since other
avenues of outside informational flow by the

1 Union remain available, the prohibition on
2 bulk mailing, reasonable in the absence of
3 First Amendment considerations, remains
4 reasonable

5 Nor does the prohibition on inmate-to-inmate
6 solicitation of membership trench untowardly
7 on the inmates' First Amendment speech
8 rights. Solicitation of membership itself
9 involves a good deal more than the simple
10 expression of individual views as to the
11 advantages or disadvantages of a union or its
12 views; it is an invitation to collectively
13 engage in a legitimately prohibited activity.
14 If the prison officials are otherwise
15 entitled to control organized union activity
16 within the prison walls, the prohibition on
17 solicitation for such activity is not then
18 made impermissible on account of First
19 Amendment considerations, for such a
20 prohibition is then not only reasonable but
21 necessary.

22 First Amendment associational rights, while
23 perhaps more directly implicated by the
24 regulatory prohibitions, likewise must give
25 way to the reasonable considerations of penal
26 management. As already noted, numerous
associational rights are necessarily
curtailed by the realities of confinement.
They may be curtailed whenever the
institution's officials, in the exercise of
their informed discretion, reasonably
conclude that such associations, whether
through group meetings or otherwise, possess
the likelihood of disruption to prison order
or stability, or otherwise interfere with the
legitimate penological objectives of the
prison environment. As we noted in *Pell v.*
Procunier ..., 'central to all other
correctional goals is the institutional
consideration of internal security within the
corrections facilities themselves.'

23 Appellant prison officials concluded that the
24 presence, perhaps even the objectives, of a
25 prisoners' labor union would be detrimental
26 to order and security in the prisons It
is enough to say that they have not been
conclusively shown to be wrong in this view.
The interest in preserving order and

1 authority in the prisons is self-evident.
2 Prison life, and relations between the
3 inmates themselves and between the inmates
4 and prison officials or staff, contain the
5 ever-present potential for violent
6 confrontation and conflagration ...
7 Responsible prison officials must be
8 permitted to take reasonable steps to
9 forestall such a threat, and they must be
10 permitted to act before the time when they
11 can compile a dossier on the eve of a riot.
12 The case of a prisoners' union, where the
13 focus is on the presentation of grievances
14 to, and encouragement of adversary relations
15 with, institution officials surely would rank
16 high on anyone's list of potential trouble
17 spots. If the appellants' views as to the
18 possible detrimental effects of the
19 organizational activities of the Union are
20 reasonable, as we conclude they are, then the
21 regulations are drafted no more broadly than
22 they need be to meet the perceived threat -
23 which stems directly from group meetings and
24 group organizational activities of the Union
25 ... When weighed against the First Amendment
26 rights asserted, these institutional reasons
are sufficiently weighty to prevail.

15 433 U.S. at 130-133. In ruling that First Amendment speech
16 rights were "barely implicated" by the prohibition on bulk
17 mailing, the Supreme Court noted:

18 The State has not hampered the ability of
19 prison inmates to communicate their
20 grievances to correctional officials. In
21 banning Union solicitation or organization,
22 appellants have merely affected one of
23 several ways in which inmates may voice their
24 complaints to, and seek relief, from prison
25 officials. There exists an inmate grievance
26 procedure through which correctional
officials are informed about complaints
concerning prison conditions, and through
which remedial action may be secured ...
With this presumably effective path available
for the transmission of grievances, the fact
that the Union's grievance procedure might be
more 'desirable' does not convert the
prohibitory regulations into unconstitutional

1 acts.

2 *Id.* at 130 n.6.

3 *Jones* is not valid authority that the confiscation of
4 Plaintiff's letters to media outlets seeking publicity for his
5 planned demonstration at the prison does not violate the First
6 Amendment. *Jones* is authority that the prison would not have
7 violated Plaintiff's First Amendment right to conduct the
8 demonstration at the prison or to solicit participation in the
9 demonstration.

10 Defendants' argue that the Plaintiff's First Amendment right
11 to send mail was not violated by the confiscation of the three
12 letters because the purpose of the letters was to promote an
13 unlawful association.

14 Defendants refer to the press release authored by Plaintiff
15 to be sent to KMPH TV, Channel 26, in Fresno:

16 This press release is being generated from
17 the Security Housing Unit (SHU) of Corcoran
18 State Prison by this Founding
19 President/Minister of Defense of the
'National Plantation Psychosis Awareness
Committee.' (N.P.P.A.C. - Pronounced N-PAC)

20 As a collateral attack on the California 3-
21 Strike Law, N.P.P.A.C. is initiating a state
22 wide demonstration through out the California
Department of Corrections (CDC), which it has
coined 'The 3-Strike Back Lash.'

23 This state wide 3-Strike Back Lash
24 demonstration starts February 26, 2003, and
25 calls for all CDC inmates to resist CDC's
26 illegal practice of the forced double celling
of unwilling inmates into cells designed for
one man occupancy. Thus creating a lethal
and barbaric gladiator environment for
inmates throughout the State of California.

1 This illegal practice of forced double
2 celling has in effect placed all CDC cells at
3 over 190% capacity and is the only single
4 element which makes the draconian 3-Strike
5 Law economically and physically possible.

6 N.P.P.A.C. is a grass-root Black Nationalist
7 Prison/Community based organization that is
8 dedicated to the eradication of social and
9 judicial injustice; traditional racism,
10 cultural amnesia; functional illiteracy;
11 miseducation; welfare, drug and alcohol
12 dependency; fatherless households; black on
13 black crime, etc. ... through proper
14 education and effective demonstrations.

15 For more information on the N.P.P.A.C. agenda
16 and/or 3-Strike Backlash demonstration
17 starting February 26, 2003, see
18 [http://www.etext.org/Politics/MIM/agitation/](http://www.etext.org/Politics/MIM/agitation/prisons/campaigns/ca/3strike.txt)
19 [prisons/campaigns/ca/3strike.txt](http://www.etext.org/Politics/MIM/agitation/prisons/campaigns/ca/3strike.txt) or email:
20 <mim@mim.org>

21 A virtually identical Press Release was authored by Plaintiff and
22 addressed to Pacifica Radio - KPFA, in Berkeley, California. The
23 Press Release addressed to Pacifica Radio also stated:

24 N.P.P.A.C. is sponsored by:

25 Dr. Donald Ray Evans, Sr. - CEO
26 National Association of Bros. & Sis Inside
and Out (NABSIO)
1713 West 108th Street
Los Angeles, Calif. 90047
Phone: (323) 755-6024
Fax: (323) 754-1506

(Doc. 93, Exhs. S and T).

27 Because Plaintiff's press releases state that the planned
28 demonstration was to be state-wide, Defendants argue that
29 easiest, most effective way for Plaintiff to communicate with
30 fellow prisoners and encourage their participation in the
31 demonstration was indirectly, through the media. Defendants

1 argue that Defendant Pear could have reasonably concluded that
2 Plaintiff had decided to use the media to communicate with
3 prisoners in other institutions, thereby furthering Plaintiff's
4 goal of disrupting normal prison operations. Defendants refer to
5 Defendant Pear's declaration in contending that Defendant Pear's
6 primary concern was not in censoring Plaintiff's mail, but in
7 preventing the unlawful demonstration that the mailings sought to
8 further:

9 5. Had this demonstration occurred, it would
10 have caused operational and security problems
11 at Corcoran. Staff would have had to be
12 diverted from work, education and food
13 service programs to provide security and
14 other [undecipherable] inmates who were out
15 of their cells and refused to enter their
16 cells. [Undecipherable] would be disrupted,
17 as inmates are counted in their cells and
18 work [undecipherable]. This would provide
19 cover for inmates attempting to escape.
20 Given [undecipherable] inmates who are not
21 allowed out of their cells past 6:00 p.m.,
could not be secured. [Undecipherable] be
used to secure inmates in their cells, which
could lead to violence and injuries to
prisoners and staff. Finally, although
Ransom claims the demonstration would remain
peaceful, Staff had no way of knowing whether
Ransom's intentions truly were peaceful or,
assuming they were, whether other inmates
would behave peaceably. For these reasons,
Ransom's planned demonstration constituted a
threat to the safe operations of the prison.

22 There is nothing in Defendant Pear's declaration that he was
23 concerned that the Press Releases would have encouraged
24 participation in the planned demonstration by prisoners housed at
25 institutions other than Corcoran.

26 Citing *Procunier v. Martinez*, 416 U.S. 396, 413 (1974), that

1 "[p]erhaps the most obvious example of justifiable censorship of
2 prisoner mail would be refusal to send or deliver letters
3 concerning escape plans or containing other information
4 concerning proposed criminal activity, whether within or without
5 the prison," Defendants argue that prison officials may also
6 refuse to send or deliver mail concerning proposed unlawful
7 activity that may be punished by means other than criminal
8 sanctions, if such mail threatens institutional security by
9 encouraging deliberate breaches of prison regulations:

10 [I]t is of no importance that Pear's
11 declaration focuses on the threat to
12 institutional security of the planned
13 demonstration, rather than the specific
14 pieces of mail. The former were intended to
15 support the latter, or at least might have
16 had that effect. The mailings constituted a
17 threat to institutional security. As in
18 *Procunier*, the connection between the
19 mailings and the planned demonstration is
20 inherent. As a practical matter, therefore,
21 the line that the Magistrate Judge attempted
22 to draw between the demonstration and the
23 mailings does not exist.

24 Defendants, emphasizing the deference federal courts pay to the
25 informed discretion of prison officials, argues that they need
26 not show that Plaintiff's proposed Press Releases in fact
encouraged other inmates to participate in the planned
demonstration. Defendants argue that the fact that Plaintiff's
efforts to publicize the planned demonstration could have served
the purpose of encouraging other inmates to join him, thus
establishing a sufficient nexus between Defendant Pear's actions
and the legitimate penological interest in maintaining

1 institutional safety and security.

2 Defendants' position is unsupported by any evidence that
3 Defendant Pear was concerned that the Press Releases would have
4 encouraged inmates from other institutions to join in the planned
5 demonstration. Defendant Pear's declaration contains no such
6 averment; Defendant Pear was concerned about the security at
7 Corcoran if the planned demonstration occurred.

8 Defendants object to the Finding and Recommendation that
9 Defendant Pear is not entitled to qualified immunity from
10 liability.²

11 Defendants contend that the proper inquiry is whether a
12 reasonable officer in Defendant Pear's position could have
13 construed Plaintiff's press releases as encouraging other inmates
14 to join his unlawful demonstration and, thus, that he was
15 protecting the safety and security of the institution by
16 preventing dissemination of the press releases. Defendants
17 contend:

18 A reasonable officer could have read the
19 releases as encouraging support for Ransom's
20 demonstration not only among the general
21 public, but among inmates. A reasonable
22 officer could have construed them as Ransom's
23 most effective way to communicate with
inmates statewide. *Procunier* recognized as
much in declaring it obviously justifiable
for prison officials to confiscate outgoing
inmate mail concerning proposed criminal

24 ²Defendants further argue that Defendant Pear is entitled to
25 immunity from suit for non-discretionary acts performed in good
26 faith pursuant to state regulations. Because Defendants did not
raise this argument in their opposition to the motion for summary
judgment, it is not discussed here.

1 activity *inside* the prison ... Thus, Pear
2 could reasonably have thought that by
3 confiscating Ransom's press releases, he was
furthering the legitimate penological goal of
preventing the demonstration.

4 Defendant Pear is not entitled to qualified immunity as
5 argued by Defendants. There is no evidence in the record that
6 Defendant Pear confiscated the press releases because he feared
7 that the press releases would encourage inmates in other
8 correctional facilities or even Corcoran to participate in the
9 demonstration.

10 For the reasons stated:

11 1. Doc. 168 is STRICKEN;

12 2. Defendants' motion for relief from the August 26, 2008
13 Memorandum Decision and Order is GRANTED to the extent that it
14 seeks consideration of Defendants' objections;

15 3. Based on the Court's *de novo* review of the record,
16 including Defendants' objections, the Court concurs with the
17 Findings and Recommendation and adopts them;

18 4. Plaintiff's motion for summary judgment, (Doc. 90), is
19 GRANTED IN PART AND DENIED IN PART;

20 5. The action is remanded to the United States Magistrate
21 Judge for further proceedings.

22 IT IS SO ORDERED.

23 Dated: October 21, 2008

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE